88-818

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JASPER J. MIRABILE, JR., et al,
Petitioners,

v.

RICHARD WRIGHT, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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November 14, 1988

QUESTIONS PRESENTED

I. DOES THE DISTRICT COURT'S JUDGMENT AWARDING PUNITIVE DAMAGES VIOLATE THE SEVENTH AMENDMENT AS AN ADDITUR WHERE THE JURY SPECIFICALLY FOUND THAT THE RESPONDENTS SUFFERED NO ACTUAL DAMAGE?

II. MUST THE DECISION BELOW THAT NO ACTUAL DAMAGES ARE NECESSARY TO SUPPORT PUNITIVE DAMAGE AWARDS BE CORRECTED TO PREVENT THE CONFUSION ALREADY RESULTING IN THE COURTS OF THE FORUM FROM THE FAILURE TO FOLLOW STARE DECISIS?

LIST OF PARTIES

The parties to the proceedings below were petitioners Jasper Mirabile, Jr., Leonard Mirabile and Sam Gianino, Jr. as defendants. Jasper's Italian Restaurant, Inc. was also a defendant at trial but verdicts were returned in its favor and plaintiffs did not appeal from judgments thereon.

Respondents James Wright, Larry E. Hout, Sr. and David Norman were plaintiffs at trial and appellees in the United States Court of Appeals for the Eighth Circuit.

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1988

JASPER J. MIRABILE, JR.,
LEONARD MIRABILE, SAM GIANINO,
JR., Petitioners,

v.

RICHARD WRIGHT, LARRY E. HOUT, SR.,
DAVID NORMAN, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners Jasper Mirabile, Jr., Leonard Mirabile and Sam Gianino, Jr. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the proceeding entitled James Wright, et al., vs. Jasper's Italian Restaurant, Inc., et al., on July 15, 1988.

OPINIONS BELOW

The Per Curiam opinion of the Court of Appeals for the Eighth Circuit has not been reported. It is reprinted in the appendix hereto, p. 2a, infra.

The Memorandum and Order of the United States District Court for the Western District of Missouri (Sachs, J.) is reported at 672 F.Supp. 424, and is reprinted in the appendix hereto, p.11a, infra.

JURISDICTION

Invoking diversity of citizenship under 28 U.S.C. Section 1332, the respondents filed this action in the Western District of Missouri. On November 9, 1987, following a jury trial, the Western District denied petitioners' Motion for Judgment Notwithstanding the Verdict.

On petitioners' appeals, the Eighth Circuit on July 15, 1988 entered a Per Curiam judgment affirming the Western District's Memorandum and Order. The petitioners' Petition for Rehearing was denied by the Eighth Circuit on August 15, 1988.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

28 U.S.C. §1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the

District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

On July 10, 1986, respondents were conducting repairs on underground water lines on the public street in front of Jasper's Italian Restaurant in Kansas City, Missouri. As part of their work, respondents Hout and Norman had blocked lanes of traffic. Petitioner Jasper Mirabile, Jr. drove his car onto the street from the restaurant parking lot, accidentally knocking over a safety barrier which had been erected by respondents. Respondent Hout shouted

obscenities at Jasper Mirabile and kicked his car. (Tr., pp. 282, 735, 740, 870). An argument ensued, eventually involving respondents, petitioners and respondents' trial attorney, Larry E. Kinnamon. (Tr., pp. 331, 350).

Police officers arrived on the scene and all parties before this Court were arrested and taken to police headquarters. (Tr., pp. 454-56, 638). All charges were subsequently dismissed. (Tr., pp. 384, 624, 881).

Admittedly, respondents Hout and Norman presented evidence they were physically touched by petitioners or some of petitioners. Nevertheless, respondents make no claims that they suffered any physical injuries. (Tr., pp. 357, 623-24, 880-81). None of respondents incurred any medical bills. (Tr., pp. 382-83, 623-24). Respondents

were not treated by any physicians, psychologists or psychiatrists as a result of the events of July 10, 1986. (Tr., pp. 357, 384, 623-24, 880-81).

The case was submitted to the jury on 23 separate allegations of assault and false imprisonment against petitioners and Jasper's Italian Restaurant, Inc., an additional defendant at trial. Respondents did not argue for nominal damages to be awarded. Instead, counsel for respondents requested that the jury award each respondent $50,000.00 actual damages on each claim for assault and for false imprisonment and $200,000.00 punitive damages on each claim. (Tr., p. 1042).

The court's written instruction on punitive damages told the jury that if it found the issues in favor of one or more of the respondents and if the jury

further believed that the conduct of the petitioners rose to the requisite level, then "in addition to any damages which you find such plaintiff entitled under these instructions you may award such plaintiff an additional amount of punitive damages." Appendix, p.22a, infra, emphasis added. Counsel for respondents did not request an instruction on nominal damages, instead stating at the instruction conference that, "I think the instructions as modified would be all that should be offered to the jury." (Tr., p. 990).

All verdicts involving defendant Jasper's Italian Restaurant, Inc. were in favor of that defendant. No actual damages were assessed by the jury against petitioners. The jury returned verdicts for respondent Wright for $5,000.00 punitive damages for false

imprisonment. The jury awarded respondent Hout $22,500.00 in punitive damages for assault. The jury found for respondent Norman on his assault claims, awarding $27,500.00 in punitive damages. Appendix, pp. 20a-21a, infra.

After the jury's verdicts were read in open court, counsel for respondents did not request that the jury be instructed for further deliberations or that the verdicts be modified in any way before the jury was discharged. (Tr., pp. 1063-64).

The court entered judgment on the verdicts in their form as returned by the jury, stating on the face of the judgment that

> The above dollar amount are derived from the jury verdicts for punitive damages. No actual damages were awarded.

Appendix, p.21a, infra.

Petitioners then filed their Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial, or in the Alternative for Remittitur. The trial court denied these motions in their entirety in the Memorandum and Order dated November 9, 1987. See Appendix, p.11a, et seq., infra.

Three aspects of the memorandum decision denying petitioners' post-trial motions require emphasis:

a. The trial court rejected petitioners' position that nominal damages cannot be assessed by a court absent some prior assessment by the jury. The court stated it was aware of no rule of federal or state procedure so dictating, instead finding that it could have made a judgment entry of nominal damages based on the verdicts in favor of respondents. See Appendix, p.17a, infra.

b. The trial court rejected authority cited by petitioners wherein an intermediate appellate court in the forum

reversed the trial court's denial of a motion for judgment notwithstanding the verdict. At trial, the jury in that case had awarded plaintiffs zero in actual damages and $10,000 in punitive damages. Melville v. Cheryl Scott Real Estate Co., 664 S.W.2d 529 (Mo.App. 1983). The court read the case as a "procedural miscarriage" and further found that in "direct injury" torts the wrong is committed regardless of pecuniary loss. See Appendix, p.15a-16a, infra.

c. The trial court reasoned that the Melville decision was a ruling by an intermediate appellate court in Missouri which had not accepted or considered a subsequent decision by the Missouri Supreme Court, Herberholt v. dePaul Community Health Center, 625 S.W.2d 617 (Mo. 1981), wherein the appellate court vacated an award of actual damages where the evidence did not support such an award and entered an award of nominal damages to support punitive damages found by the jury. Appendix, p.19a, infra.

In due course, the petitioners took appeals to the Eighth Circuit from the district court's memorandum decision. Prior to oral argument before the

appellate panel, the decision in O'Brien v. Mobil Oil Corp., 749 S.W.2d 457 (Mo.App. 1988) was handed down. Since that decision was not final at the time of oral argument, the petitioners' first opportunity to address that decision was in their Petition for Rehearing, following the panel's Per Curiam decision dated July 15, 1988.

In that Per Curiam decision, the Eighth Circuit discussed at length the concurring opinion in the O'Brien decision. Judge Satz's concurrence drew heavily from the district court's memorandum opinion, which had since been published in the Federal Supplement. The Per Curiam opinion stated

> Judge Satz's concurrence indicates that, at a minimum, Missouri law on this question does appear to be subject to varying interpretations. The district court considered appellants' arguments in its Memorandum and Order denying their motions for judgment notwithstanding

> the verdict applying an analysis similar to the analysis in Chief Judge Satz's concurring opinion.

Appendix, p.7a, infra.

The Eighth Circuit refused to reverse the district court since it did not find the lower court's interpretation of state law "fundamentally deficient in analysis, without a reasonable basis, or contrary to a reported state-court opinion." Appendix, p.9a, infra.

REASONS FOR GRANTING THE WRIT

I. The District Court's Judgment Awarding Punitive Damages Violates the Seventh Amendment As an Additur Because the Jury Specifically Found Plaintiffs Suffered No Actual Damage.

Without case law or precedent to support its result, the district court chose to deny the Petitioners their right to trial by jury by entering judgment against them for punitive damages,

despite the fact the jury found plaintiffs suffered no actual damage. In so doing, the Court below impermissibly imposed damages beyond those found by the jury. This result destroys the distinction between civil liability and criminal prosecution and disturbs the order of the law.

The lower courts had ample opportunity to rectify the contradictory verdicts returned by the jury. Incredibly, the district court chose instead to enter judgment for plaintiffs in the amount of $55,000 on punitive damages alone. Appendix, p.20a-21a, infra. Not only does the result directly conflict with case law of the forum on the relationship of actual to punitive damages, see Melville v. Cheryl Scott Real Estate Co., 664 S.W.2d 529 (Mo.App. 1983), the judgment also

unconstitutionally deprives the Petitioners of their right to a jury trial. Such a drastic departure from settled law deserves this Court's attention.

Over 50 years ago, this Court recognized that imposition by the judiciary of damages in addition to those to be awarded by a jury violates the right to a jury trial. In Dimick v. Shiedt, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935), this Court held that damages imposed by a court beyond the jury's finding violates important policy considerations. The unconstitutionality of additur prevents judges from usurping the traditional role of members of the community in resolving issues of fact. These same principles apply no less in this case.

In the trial of this matter, the jury did in fact resolve factual issues in favor of the Petitioners in finding that the plaintiffs suffered no actual damage. But the district court gave no consideration to the fact that an additur is unconstitutional. Incredibly, the trial judge held that "judges can independently direct the entry of nominal damage judgments." See Memorandum and Order, p.17a-18a, infra. Such a radical departure from settled principles of law has been accepted only in two unrelated areas.[1] The district court's bald

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[1]In the area of civil rights litigation, this Court has recognized that a finding for the civil rights plaintiff is, in itself, a significant interest which would allow courts to enter nominal damages even where no actual damages were found by the jury. Carey v. Piphus, 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1053-54, 55 L.Ed.2d 252 (1978). No such important constitutional considerations are present in this common law tort area to warrant a departure from CONT

attempt to create a new exception to the rule of law must be rejected by this Court to prevent the likely confusion to follow.

Appellate courts have vacated actual damage awards where the evidence does not support such an award and have judicially entered nominal damages. See, e.g., Jasperson v. Purolator Courier Corp., 765 F.2d 736 (8th Cir. 1985). Petitioners do not deny that if the jury in the trial of this case had returned an award of actual damages, the courts could have vacated that finding as contrary to the evidence and entered a nominal damage award to support the punitive damages. However, the Court is faced with an entirely different situation. With no actual damages found by the jury, the punitive

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the general rule precluding judges from adding to damages found by the jury.

damages, standing alone, must fall: they are unsupported by any actual damages - either compensatory or nominal - and an entry of a nominal award to support the punitive damages constitutes an additur. See O'Hagan v. Soto, 565 F.Supp. 422 (S.D.N.Y. 1983). Similarly, a judgment entered for punitive damages alone not only directly conflicts with settled law of the forum, but also conflicts with the jury's finding of no actual damages, which is in fact a verdict for Petitioners under the law of the forum. Sullivan KSD/KSD-TV, 661 S.W. 2d 49 (Mo.App. 1983). The judgment below thus violates Petitioners' right to a jury trial. The proper development of law requires that this Court correct this grievous error.

II. The Decision Below That No Actual Damages Are Necessary To Support Punitive Damage Awards Must Be Corrected To Prevent Confusion Already Resulting In The Courts Of The Forum From The Failure To Follow Stare Decisis.

The Eighth Circuit here has sanctioned such a radical departure from the usual course of judicial proceedings to warrant the exercise of this Court's full power to prevent further havoc in the law of the forum. The district court's published opinion, in disregarding the rule of stare decisis, has already led one appellate judge in the forum to question previously settled case law on the relationship between actual and punitive damages. See O'Brien v. Mobil Oil Corp., 749 S.W.2d 457, 459 (Satz, C.J., concurring).

The Eighth Circuit merely compounded the damage in its Per Curiam opinion by applying circuitous logic: the Court of

Appeals relied on the analysis of Judge Satz's concurring opinion in the O'Brien opinion, supra, which in turn followed the analysis of the district court, to find that the district court's analysis was sound. Any conclusion based on such defective reasoning can hardly be considered a legitimate basis for dismantling decades of uncontroverted law of the forum.

The case law of Missouri is unanimous: there can be no recovery for punitive damages without a finding by the jury of actual damages. Coonis v. Rogers, 429 S.W.2d 709 (Mo. 1968). The decision in Melville v. Cheryl Scott Real Estate Co., supra, explicitly follows this position. The district court, however, rejected the role of federal courts sitting in diversity by refusing to ascertain and apply the law of the

forum on the relationship between actual and punitive damages. See Hazen v. Pasley, 768 F.2d 226, 228 (8th Cir. 1985). Instead, the judgment stated specifically that the $55,000 damages were punitive damages only. Since the premise of the trial judge's Memorandum and Order is inherently unsound, the Eighth Circuit failed in its duty to reverse the District Court. Cowens v. Siemens-Elema AB, 837 F.2d 817, 823 (8th Cir. 1988). This Court should intervene to correct this error.

In the absence of conflicting decisions of the state's highest court, federal courts sitting in diversity are governed by the holdings of intermediate state courts on matters of state law. Gooding v. Wilson, 405 U.S. 518, 526, 92 S.Ct. 1103, 1107-08, 31 L.Ed.2d 408 (1972). Here, the district court refused

to follow decisions of the intermediate appellate courts of the forum. In its Memorandum and Order, the district court opined that the Missouri Court of Appeals in Melville, supra, did not state the law of the forum, and the trial judge concluded he was not bound by Melville for the reason that decision did not follow previous rulings of the Missouri Supreme Court[2].

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[2]The Memorandum and Order stated in pertinent part:

> It is possible that one or more intermediate appellate decisions in Missouri have been ruled after Herberholt wihtout accepting or considering the lesson of Herberholt. Defendants' reading of Melville would be an example of such a ruling.

Herberholt v. dePaul Comm. Health Center, 625 S.W.2d 617 (Mo.banc 1981) addressed the ability of appellate courts to vacate an actual damage verdict where the evidence did not support such damages and to enter nominal damages in its place to support punitive damages. Here, of course, there were no actual damages found by the jury for the court to vacate, so the entry of nominal damages would constitute an additur. See Section CONT

The district court failed to examine the appellate history of the Melville decision. Following the ruling of the Court of Appeals, the cause was then transferred to the Missouri Supreme Court, which retransferred the case to the Court of Appeals four months later without a written opinion. If the decision in Melville did not state the law of the forum, the Supreme Court had ample opportunity to say so, but declined to while it had jurisdiction over the case. The district court's conclusion that it was not bound by the law of the forum as set forth in Melivlle is simply not supported by the course of that case's proceedings on appeal.

The district court struggled further to distinguish Melville and explain away the law of the forum that nominal damages

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I, supra.

cannot be implied by courts. Armstrong v. Republic Realty Mfg. Corp., 631 F.2d 1344, 1351 (8th Cir. 1980). The case cited in the Memorandum and Order to support the proposition that this rule does not apply to "direct injury" torts did not even concern such a tort. See Stephenson v. Stephenson, 618 S.W.2d 715 (Mo.App. 1981). Federal courts cannot, as the district court elected to, sustain damages awarded in excess of those which could be sustained were the case before the courts of the forum. Ferren v. Richards Mfg. Co., 733 F.2d 526, 531 (8th Cir. 1984). Significantly, the respondents chose not to submit the issue of nominal damages to the jury either by written jury instruction (Tr., p. 990), or in closing argument. (Tr., pp. 1031-43; 1053-61). The district court's conclusion that nominal damages are

"implied" by a plaintiff's verdict in direct injury torts is unsupported by case law of the forum. A plaintiff's failure to submit on nominal damages precludes recovery where the jury finds no actual damages were suffered. Sullivan v. KSD/KSD-TV, 661 S.W.2d 49 (Mo.App. 1983). The federal courts follow this rule on the effect of failing to submit a theory of recovery to the jury. Roth v. Black & Decker, U.S., Inc., 737 F.2d 779 (8th Cir. 1984). The trial judge clearly reached the wrong result for the wrong reason.

Before the district court's opinion, there existed certainty and predictability in the forum on the relationship between actual and punitive damages. Since that decision, Missouri courts must unneccessarily struggle with these issues. Indeed, Judge Satz's

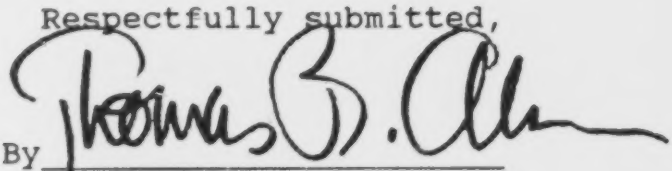
concurring opinion in the O'Brien decision after examining the district court's holding, notes "I look forward to clear sailing in calmer weather on the Sea of Black Letter Law." 749 S.W.2d at 461. Rather than sanction the lower courts' rejection of settled law, this Court should steer the courts back on course in accordance with the law of the forum.

CONCLUSION

The petitioners have raised important questions which, if left unresolved, will result in further confusion in the forum. This petition for certiorari should therefore be granted for plenary review of the judgment below. Alternatively, this Court should summarily reverse the decision of the Eighth Circuit, or grant

certiorari, vacate the judgment below, and remand the case for reconsideration. The courts and litigants in Missouri deserve no less.

Respectfully submitted,



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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2645WM

James Wright, et al., *
*
Appellees, *
*
vs. *
*
Jasper's Italian Restaurant, Inc., et al. *
*
Appellants. *

Appeal from the United States District Court for the Western District of Missouri.

Appellants' petition for rehearing has been considered by the Court and is denied.

August 15, 1988

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

James Wright, Larry E. Hout, Sr., David Norman,	*
Appellees,	*
vs.	*
Jasper's Italian Restaurant, Inc., Jasper Mirabile, Jr.., Leonard Mirabile, Sam Gianino, Jr.,	*
Appellants.	*

Appeal from the United States District Court for the Western District of Missouri.

Submitted: June 13, 1988

Filed: July 15, 1988

Before ARNOLD, Circuit Judge, FLOYD R. GIBSON, and HENLEY, Senior Circuit Judges.

PER CURIAM

Appellants, Jasper Mirabile, Jr., Leonard Mirabile, and Sam Gianino, Jr., appeal the judgment of the district

court[1] entered on a jury verdict awarding appellees James Wright, Larry E. Hout, Sr., and David Norman a total of $55,000 in punitive damages.

On July 10, 1986 the appellees were making repairs on the water lines in front of Jasper's Italian Restaurant, Inc. (restaurant). Jasper Mirabile drove his vehicle out of the Jasper's parking lot and in the process he knocked over a safety barrier placed in the street by the appellees. The subsequent events are disputed by the parties, but taking the facts in the light most favorable to the appellees, the verdict winners, it appears that profanity was exchanged between Hout and Jasper Mirabile. Jasper

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[1]The Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri. The district court's opinion is published at 672 F.Supp. 424 (W.D. Mo. 1987).

then returned to the restaurant parking lot and continued the verbal exchange with Hout. Jasper later left and went into the restaurant returning with Leonard Mirabile and Sam Gianino. The altercation escalated and all of the parties to this appeal were arrested by the Kansas City Police Department. All charges were later dismissed.

Appellees filed this diversity action in the district court seeking recovery on four separate tort theories: 1) assault; 2) false arrest; 3) false imprisonment; and 4) the tort of outrage. After a four day trial the court submitted the case to the jury on the first three theories. The jury returned a verdict for the appellees in the aggregate amount of $55,000. The jury did not award the appellees any actual damages, but based its entire

award on punitive damages. The only issue on appeal is whether the district court erred in entering judgment on the verdict and awarding appellees $55,000 in punitive damages notwithstanding the jury's award of $0 in actual damages. Appellants argue that under Missouri law an award of actual damages, even if only a nominal award, is a prerequisite to a punitive damages award.

Many Missouri cases give lip service to the categorical statement that there can be no punitive damages without an award of actual damages. See, e.g., O'Brien v. Mobile Oil Corp., 749 S.W.2d 457, 458 (Mo. Ct. App. 1988). However, as noted by Chief Judge Satz in O'Brien there is difficulty in Missouri as in other jurisdictions concerning the meaning of the work "damages". Id. at 459 (Satz, C.J., concurring). His

statement in discussing Missouri law may be summarized as follows: In cases involving torts where actual damages are an element of the tort, actual damage recovery is a prerequisite to an award of punitive damages. This is merely a short way of saying that if the plaintiff does not get an award of actual damages he has not proven his case and thus is not entitled to punitive damages. However, when the tort asserted by the plaintiff does not require a showing of actual damage as an element of the tort, e.g., false imprisonment, then there is no reason to deny an award of punitive damages when the jury has determined that there is no actual damage, but returns a verdict in the plaintiff's favor and awards punitive damages. Simply because the jury did not award actual damages does not mean that the plaintiff has

failed to prove the elements of the tort, because actual damage is not an element of direct injury tort where a wrong has been committed notwithstanding the absence of pecuniary loss. Chief Judge Satz concurred in the O'Brien decision denying the plaintiff punitive damages because in that case the plaintiff's procedural default waived the right to a correction of the verdict. Judge Staz's concurrence indicates that, at a minimum, Missouri law on this question does appear to be subject to varying interpretations. The district court considered appellants' arguments in its Memorandum and Order denying their motions for judgment notwithstanding the verdict applying an analysis similar to the analysis in Chief Judge Satz's concurring opinion.

When reviewing diversity cases involving questions of state law this court has repeatedly held that substantial deference is given to the district court's interpretation of satte law in the state in which its sits. Cowens v. Siemens-Elema AB, 837 F.2d 817, 823 (8th Cir. 1988). The only issue involved in this case is purely a question of Missouri law. Further, the question involves tort law which is generally state specific and quite often difficult to discern. It is in such circumstances that the rule giving deference to the district court's interpretation of the law of the state in which it sits has the greatest validity. The rule is founded on prudential concerns and the recognition that many time the district court is in a better position to interpret the law of

the state in which it sits than is the court. See Cullum v. Mutual of Omaha Ins. Co., 840 F.2d 619, 621 (8th Cir. 1988) (rule of deference applies especially when the state law is not clear).

A district court's interpretation of state law will only be overturned by this court if we find its interpretation "'fundamentally deficient in analysis, without a reasonable basis, or contrary to a reported state-court opinion." McCarthy Bros. Const. Co. v. Pierce, 832 F.2d 463, 467 (8th Cir. 1987) (quoting Economy Fire & Casualty Co. v. Tri-State Ins. Co., 827 F.2d 373, 375 (8th Cir. 1987)). We cannot say that the district court's decision is deficient in any of the above respects. In fact the district court's careful analysis has noted a subtle distinction in Missouri law that

distinguishes the circumstances when an award of punitive damages may be proper notwithstanding the absence of an actual damages award. Accordingly we affirm on the basis of the district court's well reasoned opinion.

See 8th Cir. R. 14.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JAMES WRIGHT, et al.)
)
Plaintiffs,)
)
vs.)
)
JASPER'S ITALIAN RESTAURANT, INC., et al.,)
)
Defendants.)

No. 86-0881-CV-W-6

MEMORANDUM AND ORDER

Three nonresident construction workers engaged in water main work in the street outside Jasper's Restaurant in the Waldo area of Kansas City have recovered various sums in punitive damages for assault and false imprisonment. Defendants are the manager and another restaurant employee as well as Jasper Mirabile, Jr., son of the founder of the restaurant. The recoveries, totaling $55,000, range from a high figure of $15,000 assessed in favor of David Norman

against Jasper Mirabile, Jr., for assault to a low figure of $2,500 assessed in favor of both David Norman and Larry Hout against Sam Gianino, Jr. for assault. The false imprisonment recovery was in favor of James Wright against Jasper Mirabile, Jr., in the amount of $5,000. The major problem presented by defendants' post-trial motions is that the jury assessed no sum for "actual damages" but only for punitive damages.

Having heard the evidence it seems clear to me that the jury was authorized to find that outrageous conduct had occurred on the afternoon in question and that there were events constituting assaults and at least one instance of false imprisonment. The jury gave this case fair and measured consideration. Some of the verdicts on plaintiffs' claims were in favor of the individual

defendants as well as the corporate defendant. While the recoveries are considerably in excess of any fines likely to be imposed in comparable criminal prosecutions they probably cannot be considered so grossly excessive, under punitive damage standards, as to authorize post-trial relief.

The absence of "actual damage" recoveries does not signify that no physical or mental harm was done, but simply the apparent difficulty of putting a dollar value on the harm to plaintiffs. The verdict forms contain a finding filled out by the jury in favor of each plaintiff against the defendant in question for either assault or false imprisonment, and then contain the figure "0" as the amount of actual damages and the pertinent figures mentioned as

punitive damages. Neither party requested and the court did not give an instruction on nominal damages, as might have been desirable.

Missouri substantive law is applicable. Defendants seek entry of judgments in their favor, notwithstanding the verdicts, and cite a recent intermediate appellate court decision which they assert is squarely in their favor. Melville v. Cheryl Scott Real Estate Company, 664 S.W.2d 529 (mo. App. 1983). The trial judge in that case rejected a post-trial motion for relief from a judgment based on a verdict in which the "jury awarded plaintiffs zero in actual damages and $10,000 in punitive damages." Stating that "nominal damages cannot be implied by us," the appellate court reversed the judgment on the theory that "Missouri follows the general rule

there can be no punitive damages without an award of actual damages."

The Melville case can easily be read as a procedural miscarriage in which plaintiff lst at $10,000 judgment because the jury neglected to award $1 nominal damages. The case is more sensibly explained, however, by a decision cited therein (Stevenson v. Stevenson, 618 S.W.2d 715, 719, (Mo. App. 1981)) in which an old rule was followed that "'deceit belongs to that class of tort of which pecuniary loss constitutes a part of the cause of action.'" This is "'in contradistinction with trespass and other direct injuries for which the complainant is awarded nominal damages if he should fail to plead and prove actual damages.'" Thus, in Melville as in Stevenson no punitive damages were allowable because plaintiff had simply

lost the case when there was a failure to establish pecuniary loss. In the present case, however, we are surely dealing with "direct injury" torts like trespass, where the wrong is committed regardless of pecuniary loss.

The Missouri Supreme Court determined in 1981 that a punitive damage award of $50,000 could be sustained for violation of the employee service letter statute, even though there was a failure of proof as to actual damages. The appellate court simply set aside the actual damage judgment and directed that $1 be entered as nominal damages. Herberholt v. dePaul Community Health Center, 625 S.W.2d 617 (Mo. banc 1981). See also Rusk Farms, Inc. v. Ralston Purina Co., 689 S.W.2d 671, 681 (Mo. App. 1985). The Eighth Circuit has similarly directed judicial entry of nominal

damages when an award of actual damages cannot be sustained. Jasperson v. Purolator Courier Corp., 765 F.2d 736, 742 (8th Cir. 1985). Apparently I could have made such a judgment entry, based on verdicts in favor of plaintiffs.

Defendants contend, however, that nominal damages cannot be assessed by a court absent some prior assessment by the jury, such as occurred in the erroneous verdicts in Herberholt, Rusk Farms and Jasperson. I am aware of no rule of federal or state procedure so dictating, and defendants' theory that the courts gave some limited effect to the mistaken actual damage assessments by juries in the cited cases seems inherently unsound. On the contrary, I believe the cases stand for the proposition that, under appropriate circumstances, judges can independently direct the entry of

nominal damage judgments. A "legal implication" of damages arises "whenever a legal right of plaintiff is violated." Rusk Farm, supra.

If there was a significant procedural defect in this case it was in the failure of the court to enter judgment for nominal damages on the jury's verdict. I cannot believe that any such a procedural defect, which saved defendants a total of $7, is a matter that is incurable, prejudicial to defendants, or would offer grounds for causing plaintiffs to lose a judgment of $55,000. While I am of course bound by Missouri substantive law as expressed by the Missouri Supreme Court, I am satisfied that after Herberholt (where, even more clearly than in this case, there was a failure to proof as to actual

damages) the plaintiffs are entitled to retain their punitive damage recoveries.*

The motions for judgment notwithstanding the verdict are DENIED.

/s/Howard F. Sachs
HOWARD F. SACHS
UNITED STATES
DISTRICT JUDGE

DATED: Nov. 9, 1987.

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*It is possible that one or more intermediate appellate decisions in Missouri have been ruled after herberholt. without accepting or considering the lesson of Herberholt. Defendants' required, however, to follow my understanding of Missouri law as gleaned from controlling opinions of the Missouri Supreme Court. R.W. Murry Co. v. Shatterproof Glass Co., 697 F.2d 818, 826-9 (8th Cir. 1983).

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JAMES WRIGHT, et al.	)
	)
Plaintiffs,	)
	)
vs.	)
	)
JASPER'S ITALIAN RESTAURANT, INC., et al.,	)
	)
Defendants.	)

No. 86-0881-CV-W-6

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED

*That plaintiff James Wright recover $5,000 against defendant Jasper Mirabile, Jr.; that plaintiff Larry Hout recover $10,000 against defendant Jasper Mirabile, Jr.; that plaintiff David Norman recover $15,000 against defendant Jasper Mirabile, Jr.; that plaintiff Larry Hout recover $10,000 against defendant Leonard Mirabile; that plaintiff David Norman recover $10,000

against defendant Leonard Mirabile; that plaintiff Larry Hout recover $2,500 against defendant Sam Gianino, Jr.; that plaintiff David Norman recover $2,500 against defendant Sam Gianino, Jr.,; and that judgment be entered in favor of defendants except as herein specified.

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*The above dollar amounts are derived from the jury verdicts for punitive damages. No actual damages were awarded.

Entered on 10-2-87

Clerk R. F. Connor Date 10-2-87

(By) Deputy Clerk Rita Riley
/s/ Rita Riley

INSTRUCTION NO. 26

If you find the issues in favor of one or more of the plaintiffs as submitted in these instructions and if you believe the conduct of one or more of the defendants towards such plaintiff as submitted in these instructions was willful, wanton, or malicious, then in addition to any damages to which you find such plaintiff entitled under these instructions you may award such plaintiff an additional amount as punitive damages against such defendant in such sum as you believe will serve to punish such defendant and to deter him and others from like conduct.

If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.